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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER BINGLEY,

Defendant and Appellant.

B205609

(Los Angeles County
Super. Ct. No. BA330029)

APPEAL from a judgment of the Superior Court of Los Angeles County.

William N. Sterling, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Christopher Bingley (appellant) of selling a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) The trial court found that appellant had suffered a prior conviction for possession of cocaine base for sale (Health & Saf. Code, § 11351.5). The trial court sentenced appellant to a term of seven years in state prison calculated as follows: the midterm of four years for the underlying offense, and an additional three years for the prior narcotics conviction. The trial court awarded appellant 165 days of presentence custody credit.

On appeal, appellant contends that the trial court violated his Sixth Amendment right to confront adverse witnesses by admitting the results of two laboratory reports performed by an analyst who did not testify at trial. We affirm the judgment.

BACKGROUND

On October 4, 2007, Los Angeles Police Department (LAPD) Officer Guillermo Avila and several other officers in the department's narcotic enforcement detail were monitoring the 800 block of Seventh Street near Towne Avenue. That particular location, according to Officer Avila, was infamous for the "chronic" sale of rock cocaine, and "buyers from all over the city [would] come and buy rock cocaine [there]."

Officer Avila testified that at 3:30 p.m., he observed appellant standing in front of a food mart on Seventh Street. A man, with the last name Mohamed, approached appellant, extended his right hand, and gave appellant some cash. Appellant took the cash from Mohamed and went inside the food mart. Five to 10 seconds later, appellant exited the food mart and stood next to Mohamed. Shortly after that, James Scott (Scott) exited the food mart, walked up to appellant, and gave appellant numerous off-white rock solids. Appellant placed the rocks in Mohamed's left palm and Mohamed stared at the rocks for some time before closing his left palm and placing his hand in his left pants pocket. Officer Avila directed his partner, Officer David Chapman, to instruct the nearby officers to arrest appellant, Mohamed, and Scott.

Officer Avila, who had received over 125 hours in narcotics training and had worked for several years as an undercover officer purchasing rock cocaine throughout the

city, testified that in his opinion, the off-white rock solids that appellant gave to Mohamed were pieces of rock cocaine and of a “usable quantity.”¹ Officer Avila also testified that in his opinion, Mohamed was the buyer, appellant was the dealer, and Scott was the supplier of the rock cocaine.

LAPD Officer Janell Badar testified that she and her partner arrested appellant who had \$70 in cash in his possession. The officers did not find any narcotics on his person.

LAPD Officer Julius Resnick testified that he and his partner arrested Mohamed who had several off-white rock solids in his pants pocket. Officer Resnick, who had worked the narcotics detail for over seven years and had seen rock cocaine over a thousand times, testified that in his opinion the rock solids recovered from Mohamed were pieces of rock cocaine.

LAPD Officer George Mejia testified that he and his partner arrested Scott. Scott was in possession of a clear plastic bag containing off-white rock solids that resembled rock cocaine and \$110 in cash.

Cheryl Will (Will), the supervisor of the LAPD narcotics laboratory, testified about two substance analyses performed by one of the laboratory’s analysts, Aaron McElrea, on the rock solids recovered from Mohamed. In the first analysis, which was a chemical analysis, McElrea placed samples of the rock solids on a microscope slide and added various chemicals, which caused micro-crystals specific to cocaine to form on the slide. Will explained that the samples tested “positive for the presence of cocaine [base]” based on the presence of these micro-crystals. In the second analysis, which was an instrumental analysis, McElrea used “a scientific instrument to produce a scan” of the rock solids. This scan confirmed that the rock solids contained cocaine base. Will testified that McElrea’s reports and testing appeared valid to her.

¹ The terms “cocaine base,” “rock cocaine,” and “crack” all refer to the same narcotic substance.

Will has a Bachelor's degree in chemistry and criminal justice, and a Master's degree in criminalistics. Will testified that as the supervising criminalist of the narcotics laboratory, she monitored the analytical tasks and chemistry performed by all of the analysts under her supervision. Will also testified that once a conclusion is reached by an analyst as to whether controlled substances are present in a sample, the analyst prepares a report and submits the report for Will's review and signature.

Will further testified that when chemical and instrumental tests are performed on a substance, the results of the tests are recorded "at the same time that the analysis is conducted," and during the regular course of business. According to Will, the tests performed by analysts in the narcotics laboratory are standard in the industry for narcotics testing. Regarding McElrea, Will testified that he had a Bachelor's degree in chemistry, had been trained on the laboratory's policies and procedures as they pertained to narcotics testing, and had passed all proficiency and competency tests issued by the laboratory.

At the conclusion of Will's testimony, the trial court admitted into evidence the chemical and instrumental laboratory reports prepared by McElrea.

DISCUSSION

I. Overview

Citing the United States Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*), appellant contends for the first time on appeal that the trial court violated his Sixth Amendment confrontation right by admitting into evidence the chemical and instrumental laboratory reports prepared by McElrea, who did not testify at trial. According to appellant, "the [U.S.] Supreme Court's decision in *Melendez-Diaz* has effectively overruled the California Supreme Court's decision in [*People v. Geier* (2007) 41 Cal.4th 555]." ²

² To distinguish between the two high courts, we will hereinafter refer to the United States Supreme Court as the "U.S. Supreme Court," and the California Supreme Court as the "Supreme Court."

We reject appellant's argument on the merits and affirm the judgment.³

II. Relevant Authority

The Sixth Amendment's confrontation clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the U.S. Supreme Court concluded that a lower court violated the defendant's Sixth Amendment confrontation right when it admitted a statement made by the defendant's wife to police officers where the wife was not subject to cross-examination at trial. It held: "Testimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."⁴ (*Crawford, supra*, at p. 59.) The U.S. Supreme Court declined to "spell out a comprehensive definition of 'testimonial,'" but noted that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Id.* at p. 68.)

³ Appellant concedes that he did not object to Will's testimony or the admission of the laboratory reports below. The People contend that he has forfeited his confrontation claim on appeal. Generally, a defendant waives his right to claim error under the Sixth Amendment's Confrontation Clause on appeal by failing to object below. (*People v. Lewis* (2006) 39 Cal.4th 970, 1028, fn. 19 ["We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 ["Defendant has not preserved his claim for review. . . . There was neither a 'specific' nor 'timely' objection below predicated on the Sixth Amendment's confrontation clause"].) Appellant contends that any objection would have been futile at the time because the U.S. Supreme Court had not yet issued its decision in *Melendez-Diaz*. We need not decide the forfeiture issue because we conclude that appellant's argument fails on the merits.

⁴ In doing so, the Court overruled its decision in *Ohio v. Roberts* (1980) 448 U.S. 56, which held that an out-of-court statement was admissible if it fell under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Id.* at p. 66.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the U.S. Supreme Court explained what it considered to be testimonial statements. The admissibility of two out-of-court statements made by declarants who were not present at the defendant's trial was at issue in *Davis*. The first statement was a 911 recording in which the declarant described the events of a domestic disturbance to the emergency operator as they unfolded before her. (*Id.* at pp. 817–819.) The second was a statement made to police officers in which the declarant answered questions about a domestic disturbance that had already occurred. (*Id.* at pp. 819–820.) The U.S. Supreme Court held that the first statement was not testimonial primarily because the declarant “was speaking [to the emergency operator] about events *as they were actually happening*, rather than ‘describ[ing] past events,’ *Lilly v. Virginia* (1999) 527 U.S. 116, 137.” (*Id.* at p. 827.) In contrast, the second statement was testimonial because the declarant was providing a “narrative of past events [to the police, which] was delivered at some remove in time from the danger she described.” (*Id.* at p. 832.)

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the Supreme Court addressed the issue of whether results from DNA testing were admissible at trial where the person who conducted the testing was not subject to cross-examination. In *Geier* the defendant was charged with murder and forcible rape. Seminal fluid recovered from the victim's body matched the defendant's DNA. At trial, the supervisor of the laboratory which conducted the DNA testing testified about the results of the testing, and further testified that the analyst who conducted the testing recorded her observations while the testing took place. (*Id.* at p. 596.)

The Supreme Court held that although the DNA testing was requested by a police agency and would likely be used at a later criminal trial, the DNA results admitted into evidence were not testimonial because the analyst's “observations . . . constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events.” (*Geier, supra*, 41 Cal.4th at p. 605.) “That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis,

and the results of that analysis as she was actually performing those tasks.” (*Id.* at pp. 605–606.) Accordingly, in the Supreme Court’s view, the DNA results were like the contemporaneous statement made to the 911 operator as the crime unfolded in *Davis*, and unlike the narrative made to police officers after the crime had already taken place. (*Geier, supra*, at pp. 605–606) The Supreme Court emphasized that “the crucial point is whether the statement represents the contemporaneous recordation of observable events” and *not* whether “it might reasonably be anticipated [that the statement] will be used at trial.” (*Id.* at pp. 606–607.)

The U.S. Supreme Court recently revisited the issue of out-of-court testimonial statements in *Melendez-Diaz, supra*, 129 S.Ct. 2527. In that case, authorities arrested the defendant in possession of bags containing a substance that resembled cocaine. (*Id.* at p. 2530.) At trial, the prosecution placed into evidence the bags seized from the defendant and submitted three “‘certificates of analysis’” showing the results of the forensic analysis performed on the seized substances. The certificates, which were prepared almost a week after the testing of the substance occurred, reported the weight of the seized bags and stated that the substance inside the bags “‘was found to contain: Cocaine.’” (*Id.* at pp. 2531, 2535.) The certificates were sworn to before a notary public by analysts at the state’s department of health laboratory, as required by Massachusetts law. (*Ibid.*) Further, under Massachusetts law, “the sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance” (*Id.* at p. 2532.)

The Supreme Court, in a 5-4 decision, held that these certificates of analysis were “quite plainly affidavits” and thus, “within the ‘core class of testimonial statements,’” subject to the confrontation restrictions in *Crawford*. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) Because the certificates were testimonial in nature, the defendant was entitled to confront the analysts who signed them absent a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them. (*Ibid.*) At the conclusion of its decision, the majority noted that its

holding in *Melendez-Diaz* was “little more than the application of [its] holding in *Crawford v. Washington*, 541 U.S. 36” because the certificates in question were simply “ex parte out-of-court-affidavits,” which the prosecution could not rely on to prove its case. (*Melendez-Diaz*, *supra*, at p. 2542.)

Four days after issuing its decision in *Melendez-Diaz*, the U.S. Supreme Court denied certiorari in *Geier*. (*Geier*, *supra*, 41 Cal.4th 555, cert. den. *sub nom. Geier v. California* (2009) __U.S.__ [129 S.Ct. 2856].)

III. Analysis

We are thus faced with the question of whether, as appellant puts it, *Melendez-Diaz* has effectively overruled *Geier*. In our view, there are two significant differences between *Melendez-Diaz* and *Geier*.

In *Geier*, the director of the laboratory where the DNA testing occurred testified that she supervised the work of six analysts in the laboratory, including Yates, the analyst who matched the DNA found on the victim’s body to the defendant’s DNA. (*Geier*, *supra*, 41 Cal.4th at p. 594.) The director testified that she reviewed the testing conducted by Yates and determined that it was according to protocol. (*Id.* at p. 596.) It was in the context of this testimony by the director, which was subject to the defendant’s cross-examination, that the trial court admitted the results of the DNA testing performed by Yates.

On the other hand, no live testimony was offered in *Melendez-Diaz* on the composition of the seized substance. Rather, the admitted evidence consisted only of affidavits. The U.S. Supreme Court emphasized that the affidavits “contained only the bare-bones statement” that the seized substance contained cocaine, and the defendant “did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analyst may not have possessed.” (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) Unlike a live witness, these affidavits were not subject to cross-examination and the prosecution, under state law, could use them as “prima facie evidence of the

composition, quality, and the net weight’ of the analyzed substance” (*Id.* at p. 2532.)

In addition, the DNA results in *Geier* “constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events.” (*Geier, supra*, 41 Cal.4th at p. 605.) In contrast, the affidavits in *Melendez-Diaz* were prepared a week after the actual testing occurred. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2535.) In this sense, the affidavits in *Melendez-Diaz* were much more like the narrative of past events to police officers deemed testimonial in *Davis*.

We conclude that *Geier* is distinguishable from *Melendez-Diaz* on the two bases discussed above, and is still controlling in this state. Our decision is supported by two recent appellate decisions. In *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047 (*Rutterschmidt*), the Court of Appeal affirmed admission of a supervisor’s testimony regarding toxicology testing by one of his subordinates who did not testify at trial. The appellate court held that unlike the affidavits held inadmissible in *Melendez-Diaz* “the toxicological findings were not proved by means of an affidavit.” (*Rutterschmidt, supra*, at p. 1075.) Rather, the supervisor was subject to cross-examination and the defense could test the supervisor’s conclusion as to the presence of alcohol and drugs in the victim’s blood. (*Ibid.*) The appellate court emphasized that *Melendez-Diaz* was decided on the “narrow basis” that the confrontation clause was implicated because the challenged certificates were clearly affidavits. (*Rutterschmidt, supra*, at p. 1075.)

In *People v. Gutierrez* (2009) 177 Cal.App.4th 654, 664–666 (*Gutierrez*), the Court of Appeal held that the confrontation clause was not implicated when a supervising nurse practitioner testified about a sexual assault examination she did not perform, and when a forensic supervisor testified about DNA results obtained by an analyst under her supervision. The appellate court noted that “*Geier* is still good law after *Melendez-Diaz*” and distinguished *Geier* and *Melendez-Diaz* on the bases that *Geier* involved live testimony whereas *Melendez-Diaz* did not, and *Geier* involved a contemporaneous

recording of observable events whereas *Melendez-Diaz* involved results prepared almost a week after the testing occurred.⁵ (*Gutierrez, supra*, at p. 666.)

We turn now to whether the results of the chemical and instrumental analyses in this case are admissible. Unlike the affidavits held inadmissible in *Melendez-Diaz*, there was live testimony in this case by an expert about how the analyst performed the chemical and instrumental analyses, how the analyst met all of the competency requirements imposed by the laboratory, how the tests performed by the analyst were standard within the field of narcotics drug testing, and how the results appeared valid to her. Defense counsel was free to cross-examine the witness on any of these issues. Like the DNA results held admissible in *Geier*, the results of the substance analyses performed

⁵ We are aware of two decisions in which appellate courts have reversed criminal convictions in light of *Melendez-Diaz*.

In *People v. Dungo* (2009) 176 Cal.App.4th 1388, the defendant was convicted of second degree murder of his girlfriend. At trial, a pathologist relied exclusively on an autopsy report that he did not prepare to form his opinion that the girlfriend died as a result of asphyxia and that she was strangled for at least two minutes. (*Id.* at p. 1394.) The Court of Appeal held that the autopsy report was testimonial because its “primary purpose” was to “prove some past fact, i.e., the circumstances, manner, and cause of [the victim’s] death, for possible use in a criminal trial.” (*Id.* at p. 1401.) In contrast, the primary purpose of the testing performed by the analyst in this case was not to prove some past fact, such as how appellant obtained the rock solids or whether the rock solids found on Mohamed was given to Mohamed by appellant. Rather, the purpose of the testing was to determine whether the rock solid contained a controlled substance.

In *People v. Lopez* (2009) 177 Cal.App.4th 202, the defendant was convicted of vehicular manslaughter while intoxicated. A criminalist tested the defendant’s blood and reported a blood alcohol content level of 0.09 percent. (*Id.* at p. 205.) The criminalist’s supervisor testified at trial about the results of the testing, but did not testify when the results of the testing were recorded. (*Ibid.*) The Court of Appeal held that the blood alcohol report created by the criminalist was “indistinguishable from the certificates described in *Melendez* and was therefore testimonial hearsay evidence admitted in violation of the *confrontation clause of the Sixth Amendment to the United States Constitution.*” (*Id.* at p. 208.) The supervisor in the case before us specifically testified that the results of the chemical and instrumental analyses were recorded while the testing occurred, thus bringing the present case squarely under *Geier*.

in this case were recorded contemporaneously, i.e., “at the same time that the analysis [was] conducted,” and during the regular course of business. Because the chemical and instrumental analyses conducted by the analyst in this case were clearly “contemporaneous recordation[s] of observable events rather than the documentation past events,” they were admissible as nontestimonial statements under *Geier, supra*, 41 Cal.4th at page 605.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ